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DEC 20 2008

In re Application of :
Charles Schreiber :
Application No. 10/657,450 : **DECISION ON PETITION**
Filed: September 8, 2003 :
Attorney Docket No. 83336.1604 :

This is a decision on the petition under the unavoidable provisions of 37 CFR 1.137(a), filed September 29, 2008, to revive the above-identified application. In the alternative this petition is being treated under 37 CFR 1.137(b).

The petition is **DISMISSED**.

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This above-identified application became abandoned for failure to timely file a proper response to a final Office Action, which was mailed on October 24, 2007. The final Office Action set a three (3) month shortened statutory period for reply. An amendment was submitted on January 24, 2008. In response to the amendment an Advisory Action was mailed on May 27, 2008 indicating the amendment submitted on January 24, 2008 did not place the application in condition for allowance. Accordingly, this application became abandoned on January 25, 2008. A Notice of Abandonment as mailed on June 13, 2008. A petition under 37 CFR 1.137(a) was dismissed on September 15, 2008.

On renewed petition, petitioner continues to advance the same argument presented in the original petition.. Petitioner contends that a Request for Continued Examination (RCE) was filed in response to the Final Office Action on January 24, 2008. In support of petitioner's argument a copy of the RCE, Electronic Acknowledgement Receipt, and Fee Transmittal form. Petitioner further notes that applicant's deposit account was deducted of the RCE fee.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable;

and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable within the meaning of 37 C.F.R. § 1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Director to have been “unavoidable.” See, 37 C.F.R. § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm’r Pat. 31, 32-33 (Comm’r Pat. 1887) (the term “unavoidable” is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business.”); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm’r Pat. 139, 141 (Comm’r Pat. 1913). In addition, decisions on revival are made on a “case by case basis, taking all the facts and circumstances into account.” Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

Petitioner’s argument has been considered but is not persuasive. A review of the record shows that an RCE was received on January 24, 2008. However, the RCE was directed to application No. 29/247,798. All correspondence related to a national patent application already filed with the U.S. Patent and Trademark Office must include the identification of the application number or the serial number and the filing date assigned to the application by the Office. See, 37 CFR 1.5(a). Further review shows that the RCE in addition to containing the incorrect application number, contained the incorrect filing date, docket number, art unit, first named inventor and examiner name. As such the RCE was not matched to application no. 10/657,450 because none of the required identifiers was included on the RCE submitted on January 24, 2008. It is further noted the copy of the RCE submitted on petition (which contains the correct application number and correct identifiers), is not the RCE filed on January 24, 2008. As such the failure to include any proper identifiers cannot be construed as a minor error. Nor can the failure to submit an RCE with the correct application number be construed as unavoidable delay.

Petitioner has included a copy of the Electronic Filing Receipt, which shows that an RCE was submitted on January 24, 2008. The fact that an RCE was submitted on January 24, 2008 is not in question. The RCE was received in the Office and initially entered in application 10/657,450. However, upon examination of the document was closed because all of the identifiers stated the application belonged to application no. 29/247,798. Thus, the RCE was properly not processed.

A delay caused by an applicant’s lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered “unavoidable”. See In re Sivertz, 227 USPQ 255, 256 (Comm’r Pat. 1985).

Accordingly, petitioner has failed to provide any facts or evidence that warrant a finding of unavoidable delay.

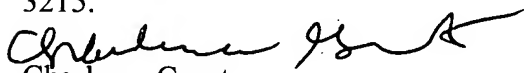
Petition under 37 CFR 1.137(b)

The petition is **GRANTED**.

The petition satisfies the requirements of 37 CFR 1.137(b) in that petitioner has supplied (1) the reply in the form of a Request for Continued Examination (RCE) and fee of \$405, and the submission required by 37 CFR 1.114; (2) the petition fee of \$770; and (3) a proper statement of unintentional delay.

This application is being referred to Technology Center AU 3714 for processing of the RCE and for appropriate action by the Examiner in the normal course of business on the amendment previously submitted in accordance with 37 CFR 1.114.

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3215.


Charlema Grant
Petitions Attorney
Office of Petitions